

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Civil Miscellaneous Appeal No.247 of 2001

K.Chandra .. Appellant

Vs.

R.Chinnasamy .. Respondent

Appeal under Section 19(1) of the Family Courts Act 1984, to set aside the judgment and decree of divorce dated 21.07.2000 made in F.C.O.P.No.1660 of 1998 on the file of II Additional Principal Judge, Family Court, Chennai.

For Appellant : Mr.D.Selvaraju
For Respondent : Mr.C.Ravichandran for
M/s.L.Dhamodaran

J U D G M E N T

(Delivered by P.D. DINAKARAN, J.)

This is an appeal preferred by the wife against the judgment and decree dated 21.07.2000 made in F.C.O.P.No.1660 of 1998 laid by the respondent/husband on the file of II Additional Judge, Family Court, Chennai, granting a decree for dissolution of the marriage taken place between the appellant/wife and the respondent/husband on 21.10.1991 at West Community Hall, Sankari, on the ground of desertion under Section 13 (1) (ib) of the Hindu Marriage Act.

2. For the sake of clarity, the appellant, who was the respondent in O.P. is referred to as the wife and the respondent, who was the petitioner in O.P. before the Family Court, is referred to as the husband.

3.1. The brief facts of the case are stated as follows:

3.2. The marriage between the husband and the wife was solemnized on 21.10.1991 at West Community Hall, Sankari as per the Hindu rites and customs. The wife is nonetheless the cousin sister's daughter of the husband. Out of the lawful wedlock, a male child was born on 07.10.1992.

3.3. According to the husband, the wife used to go to her mother's house at Sankari and stay there indefinitely, even without intimating to the husband. The attempt of the husband to bring her to his place of residence at Chennai on 08.02.1994 was failed. Even though the husband filed a police complaint alleging that he was attacked by his father-in-law and brother-in-law and sustained injury on 08.02.1994, he had withdrawn the same stating that there was a family quarrel between him and his in-laws and that he would lead a proper married life in future. After some time, the wife, threatening the mother of the husband that she would commit suicide, consumed some tablets and thereafter, she was taken to the hospital for necessary treatment. Further, the father of the wife had taken back 10 sovereign of jewels which was given to his wife during the marriage.

3.4. Thus, the husband, complaining that in spite of cruelty, harassment and desertion, the wife refused for reunion, filed O.P.No.787 of 1996 on the file of II Additional Judge, Family Court, Chennai, for restitution of conjugal rights. In the said O.P.No.787 of 1996, the wife filed a counter stating that she was willing to join her husband provided he would not demand five sovereigns of jewels. As the said statement of the wife was false, the husband was constrained to withdraw the petition for restitution of conjugal rights, viz. O.P.No.787 of 1996 and filed the present O.P.No.1660 of 1998 for dissolution of the marriage.

3.5. O.P.No.1660 of 1998 was resisted by the wife denying all the allegations made against her by the husband and stating that her parents gave 20 sovereigns of gold jewels, a steel cot and Rs.10,000/- for vessels as demanded by the husband and his family and also spent Rs.1,00,000/- for marriage; after the birth of the male child on 07.10.1992, the husband, demanding more dowry viz., five sovereigns of gold, harassed and tortured her; unable to bear mental agony, she sent a telegram to her parents on 29.04.1994; on 06.05.1994, the husband left the wife and child at her parents' house and refused to take them until she brings five sovereigns of gold; she wrote several letters to the husband not to insist on gold jewels and pleaded him to take back her and the child; the husband caused legal notice, to which, the wife sent a reply stating that she was willing to join him, provided he would not demand five sovereigns of gold jewels; subsequently the husband withdrew the O.P. filed by him for restitution of conjugal rights and filed the above O.P. for dissolution of the marriage; she also filed a petition viz., H.M.O.P.No.23 of 1999 for restitution of conjugal rights before the Family Court, Sankari; and as the husband got a

decree for divorce, the O.P. filed by her got dismissed for non prosecution by order dated 27.10.2003.

4. The trial Court framed an issue as to whether the wife deserted the husband or not and tried the matter. During the trial, the husband examined himself as P.W.1, narrated the story of the desertion and one Murugesan, a friend of the husband, as P.W.2 to corroborate his testimony that he made several attempts to bring his wife, and marked Exs.P1 to P20 documents, of which, many of them are relating to the letter correspondence between himself and his wife.

5. We have perused the judgment and decree of the trial Court in the light of both the oral and documentary evidence.

6.1. Mr.D.Selvaraju, learned counsel appearing for the appellant/wife, assailing the judgment and decree of the trial Court granting decree of divorce, contends that the trial Court failed to consider the material evidence in proper perception.

6.2. The learned counsel further contends that the conduct of the husband in filing an O.P. for restitution of conjugal rights and withdrawing the same and thereafter, filing another O.P. for divorce would make it clear that there was no wilful desertion on the part of the wife and the mere separation is not sufficient to grant decree of divorce, in the absence of animus deserendi, particularly when the wife was willing to join the husband.

7.1. Per contra, the learned counsel appearing for the respondent/husband submits that the trial Court is justified in granting a decree of divorce, as the same was ordered only after appreciating both oral and documentary evidence.

7.2. The learned counsel further contends that the O.P.No.787 of 1996 was filed by the husband for restitution of conjugal rights only with an intention to join the wife, as she was staying in her parents' place deserting him. Since an allegation was made by the wife that he demanded five sovereigns of jewels, the husband had withdrawn the said O.P.No.787 of 1996 and filed O.P.No.1660 of 1998 for divorce. Even though the wife stated that she was willing to join the husband, she never accepted for reunion, which would prove the wilful desertion by the wife.

8. We have heard the learned counsel for both sides and also perused the materials available on record.

9.1. Apropos of desertion, it only means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and reasonable cause. The two essential elements to prove desertion are the factum of separation and the intention to bring cohabitation permanently to an end (animus deserendi). Furthermore, two

elements that are essential for the deserted spouse are (a) the absence of consent and (b) the absence of a conduct giving reasonable opportunity to the spouse leaving the matrimonial home to form the necessary intention aforesaid. In the instant case, the respondent had not proved the factum of separation or animus deserendi, in the light of any evidence or material let in before the Court.

9.2. The evidence of husband would show that the wife used to go to her mother's house at Sankari and stay there indefinitely, even without intimating to the husband; on 08.02.1994, when he went to his in-law's house to bring back his wife and child after delivery, he was attacked by his father-in-law and brother-in-law and driven out of the home, necessitating him to prefer a police complaint, which was withdrawn by him subsequently; the wife left the matrimonial home on 04.07.1994 without his knowledge and consent and also refused to join him in spite of his repeated requests and efforts.

9.3. On the other hand, the wife, in her evidence, has stated that her husband came to her parents' house on 08.02.1994 and refused to take back her and child without five sovereigns of jewels; her father and brother never ill-treated her husband; she wrote several letters to the husband not to insist on jewels as her parents were not in a position to afford the same; even in the counter filed in O.P.No.787 of 1996, it was stated that she was always willing to join him provided he would not demand five sovereigns of jewels; and she had not deserted him willfully and it was the husband who refused to take her back.

9.4. A perusal of the evidence of both the husband and wife would show that though there was an allegation by the husband that the wife refused to join him, he himself had specifically stated that he had taken back his wife and child on 08.02.1994 and thereafter, she left the matrimonial home on 04.07.1994 as he demanded five sovereigns of jewels and therefore, the allegation that the wife refused to join him will not deserve any importance.

9.5. Further, in spite of several letters written by the wife expressing her willingness to join him, the husband did not respond and therefore, he cannot complain that the wife had deserted him, particularly, when the fact remains that the wife had filed H.M.O.P.No.23 of 1999 for restitution of conjugal rights before the Family Court, Sankari and she did not prosecute the same since the husband got a decree for divorce, which led to the dismissal of the said H.M.O.P. for default.

9.6. Moreover, it is clear that the husband had withdrawn O.P.No.787 of 1996 in view of the allegation made by the wife that he demanded five sovereigns of gold jewels and failure to prove that the said allegation is false would belie his case that she deserted him.

9.7. The mere statement of the husband that the wife left to her parents' place would not amount to desertion. That apart, the respondent had not proved the factum of separation or animus deserendi, in the light of any evidence or material let in before the Court. In the absence of any such evidence or material to prove that the wife had deserted the husband and to put an end to the martial relationship, the mere separation would not constitute desertion for granting dissolution of marriage. Therefore, we are unable to appreciate the findings of the trial Court that the wife had deserted the husband, which led to the grant of divorce on the ground of desertion.

10. In the result, finding no material forthcoming to enable the husband to make out a case for divorce on the ground of desertion, we hold that the trial Court had erred in granting divorce on the ground taken out by the respondent. Hence, the appeal is allowed and the order of the trial Court granting divorce is set aside. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

ATR

To

1. The Judge,
II Additional,
Family Court, Chennai.

2. The Section Officer,
V.R.Section, High Court, Madras

1 cc To Mr.D.Selvaraj, Advocate, SR.51566.

1 cc To Mr.L.Dhamodharan, Advocate, SR.51668.

BK(CO)

RVL 12.01.2007

C.M.A.No.247 of 2001